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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. HAROLD GAINES, Defendant and Appellant.	A155602 (San Francisco County Super. Ct. No. SCN227622, 17005315)

After two magistrates denied his motions to suppress and traverse the warrant, Harold Gaines pled guilty to assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1))[1] and the trial court sentenced him to three years in state prison. On appeal, Gaines challenges the denial of these motions.

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

We provide a brief overview of the facts here, and additional background in the discussion of Gaines's specific claims.

On the evening of April 8, 2017, a man robbed and assaulted Y.Y. in the lobby of her apartment building. The man wore blue and black track pants, a black jacket, and a fedora. The San Francisco Police Department issued a crime bulletin with a picture of the suspect. The next day, two police officers spoke with Gaines in a small park about a block from the robbery location. During a photo lineup, Y.Y. did not identify a suspect,

[1] Statutory references are to the Penal Code.

but she identified Gaines in a cold show identification. Officers executed a search warrant at Gaines's residence and found a black jacket, fedora hats, blue and black Nike pants, a knife, and Y.Y.'s credit cards and driver's license.

As relevant here, the prosecution charged Gaines with residential robbery (§ 211) and assault with a deadly weapon (§ 245, subd. (a)(1)). Before the preliminary hearing, Gaines moved to suppress and traverse the search warrant. At a combined preliminary and suppression hearing, a magistrate denied the suppression motion and held Gaines to answer the charges. Another magistrate held an evidentiary hearing on the motion to traverse the warrant and denied the motion. The trial court denied Gaines's motion to set aside the information. Gaines pled guilty to assault with a deadly weapon (§ 245, subd. (a)(1)) and the court sentenced him to three years in prison.

DISCUSSION

I.

The Magistrate Properly Denied the Motion to Suppress

Gaines contends the magistrate erred by denying his suppression motion. He claims he was detained at the park without reasonable suspicion, and that he was arrested without probable cause during the cold show identification. We disagree.

A. Suppression Hearing

On the evening of April 8, 2017, San Francisco Police Officer Diane Khuu went to an apartment building on Eddy Street on a "call of a strong-armed robbery." Khuu entered the lobby area and noticed a woman—Y.Y.—"sitting on the ground with a big laceration [on] the back of her head." The wound was "bleeding significantly." An ambulance took Y.Y. to the hospital, where Khuu interviewed her.

Y.Y. told Khuu she entered her apartment building and was walking through the lobby when she felt someone grab her shoulders from behind, as if the person were "hugging her." Y.Y. turned around and saw a man pulling "her further into the lobby." He grabbed the strap of Y.Y.'s purse and "pulled her to the ground." The man took Y.Y.'s cell phone, wallet, and credit cards. Then he said: " 'Where is your money?' " When Y.Y. told the man "that was all that she had," he hit her in the head several times

with a knife. The man also kicked Y.Y. in the abdomen and ribs. Then he left. According to Y.Y., the man was Black, about 40 to 50 years old, and about 5 feet 11 inches to 6 feet tall. The man wore a "dark jacket, dark pants" and a hat with a circular brim.

Another law enforcement officer reviewed the apartment building's surveillance video, which showed the backside of man wearing matching blue and black track pants, a black jacket, and a fedora. He was carrying a knife. With his cell phone, the officer took a color picture of the man in the video. Sergeant Brett Thorp put the picture in a crime bulletin. The bulletin described the suspect and stated his "clothing [was] very distinct."

The next day, April 9, 2017, Officer Scott McBride saw the crime bulletin. He and his partner, Officer McMillan, were on Fillmore Street, at a small park about a block from Y.Y.'s apartment building. McBride was in uniform and was wearing a body camera; McMillan wore plain clothes.[2] Gaines was standing next to a park bench, wearing a bright blue jacket. McBride noticed Gaines's jacket and thought it was similar to the one worn by the suspect in the crime bulletin. Gaines was 5 feet 6 inches—not 5 feet 11 inches to 6 feet as described by Y.Y.—but his build and race matched the description of the suspect in the crime bulletin. Gaines was also wearing a "Fedora-type hat" consistent with the photograph in the crime bulletin.

The officers approached Gaines. McMillan showed Gaines his badge, then asked Gaines for his name and identification, and whether Gaines "had any weapons on him." Gaines said he did not have identification, but told McMillan his last name. McMillan asked Gaines for his date of birth. Gaines asked, "What's the problem, officer?" and McMillan responded: "We're just looking into something." Gaines remarked, " 'Out of everyone in this park, you came to me.' " McBride assured Gaines the officers were not hassling him, and asked Gaines, "Where do you stay at?" Then McBride and Gaines talked about Gaines's residence while McMillan ran Gaines's name through dispatch.

[2] The court admitted the crime bulletin and the body camera video into evidence.

McBride asked whether Gaines had a middle name. McBride spoke to Sergeant Thorp on the phone, and then Gaines was asked for his address and his phone number. McBride asked McMillan, "did you get a mug?" While McMillan retrieved a photograph of Gaines, McBride and another person in the park made small talk. McBride asked Gaines for his age. Gaines responded, "56." McMillan procured the photograph. When McMillan showed Gaines the photograph, Gaines said, "that's me back in the old days." Then McMillan asked Gaines to show his hands. As Gaines showed his hands, McMillan appeared to briefly touch them to indicate Gaines should flip his hands over. After asking Gaines for his address and phone number again, McBride thanked Gaines for his cooperation, and McMillan told Gaines to "take it easy." Then Gaines left the park.

McBride showed the body camera footage to Thorp. Thorp told McBride to "place [Gaines] into custody" if McBride saw him again, because Thorp considered Gaines a suspect in the robbery. That same day, Thorp and another officer showed Y.Y. a six-picture lineup containing Gaines's picture. Y.Y. told the officers she was scared during the incident; that her head had been down most of the time; and that she did not think she could remember the man's face. The officers showed Y.Y. the pictures one at a time. Y.Y. did not identify Gaines's picture. When Y.Y. looked at Gaines's picture, she said " 'no.' "

On April 10, 2017, McBride and other officers surveilled Gaines's residence. When McBride saw Gaines leave through the back door, he handcuffed and patsearched him. McBride did not tell Gaines he was under arrest. About 15 or 20 minutes later, Thorp and other officers arrived with Y.Y. for a cold show identification. An officer explained the procedure and took Y.Y. to view Gaines, who was standing about 10 to 15 feet away, in handcuffs next to two uniformed police officers. Y.Y. started crying and said, " 'That's him.' " Gaines was taken to a police station.

Defense counsel argued Gaines was detained in the park because he "was held for 13 minutes; he was asked for his ID; he was asked for his name, his birthday, his phone number. [¶] The officers were clearly identified. Officer McBride was in full uniform. The other officer had his star shown, and it was very clear that they were officers. The

officers asked to see [Gaines's] hands and actually touched him. It was two officers; he was one person." Counsel also noted the language McBride used—that he was told by Thorp to release Gaines—suggested Gaines "was not free to leave." Next, defense counsel argued the detention was not supported by reasonable suspicion because Gaines did not match the description of the suspect in the crime bulletin. Finally, counsel challenged the cold show, arguing it was a "de facto arrest without probable cause" because Gaines "was placed into handcuffs. He was moved around. He was forced to wait." According to counsel, neither the crime bulletin nor the interaction in the park provided probable cause to arrest.

The magistrate denied the motion, explaining: "As to the first contact on April 9th, after watching the footage from the body-worn camera the Court finds this to be a consensual encounter. . . . [¶] . . . [T]here was some show of authority. There was a request to have him show his hands, and he did comply with that demand. But based upon the timing of the encounter, the fact that it was in a public location, the overall tone and manner of the conversation, it appears to be more of a casual and joking tone of the officers at least. I understand that is not Mr. Gaines' tone in this encounter."

The court continued, "The fact that there are two officers, one of whom is dressed in civilian clothing, neither of whom displayed a firearm . . . , the fact that Officer McBride walked away for a period of time to make a phone call, and the fact that it doesn't appear that Mr. Gaines is searched during this encounter or even patted down and he's not removed from the location where he was originally encountered, and finally, based upon the fact that I think that Mr. Gaines was asked for his identification [and] he said he didn't have it on him, and the officers didn't push him to produce further I.D. [¶] So based upon all these factors, I'm making a finding that it was a consensual encounter and further finding that even if The Court were to find this to be detention, I think that there was reasonable suspicion based upon the closeness in date and time and location to the scene of the incident, the similarity of the hat, the general match as to race, age and build."

The court continued, "And I will acknowledge there was description given of an individual that was between 5'10" and 6', whereas Mr. Gaines . . . is 5'6". So I will acknowledge that there was a mismatch as to his height. [¶] But I think the issue for me was the rather distinctive clothing in question. Looking at the photograph taken by the surveillance camera on the date of the incident and comparing it with the body-worn footage taken on April 9, it seems to me that Mr. Gaines is wearing a matched jumpsuit. It appears to be, in my opinion, a Michael Jordan North Carolina jumpsuit with the number 23 on the sleeve. It appears to be a matching warmup suit. [¶] When the officers took a photo of the pants and a part of the top in the original incident and then compared it to him at the . . . park a few days later with him wearing a similar jacket with a distinctive blue color.

"So turning to the second encounter on April 10th, given The Court's finding there was reasonable suspicion to detain as of April 9 the officers continued to have reasonable suspicion after comparing the photos, and The Court finds that the brief detention of roughly half an hour is permissible for purposes of conducting a cold-show identification. [¶] And neither the movement of Mr. Gaines . . . , nor the length of the detention makes the detention unlawful, and therefore The Court denies the defense motion to suppress."

B. The Encounter in the Park was Consensual, and Any Assumed Detention Was Supported by Reasonable Suspicion

When reviewing a ruling on a motion to suppress, we "defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment." (*People v. Glaser* (1995) 11 Cal.4th 354, 362.) When a suppression motion is made at the preliminary hearing and renewed in the trial court, we concern ourselves " 'solely with the findings of the [magistrate].' " (*People v. Romeo* (2015) 240 Cal.App.4th 931, 941.) We are "bound by the magistrate's factual findings so long as they are supported by substantial evidence," and "consider the record in the light most favorable to the People since 'all

factual conflicts must be resolved in the manner most favorable to the [superior] court's disposition on the [suppression] motion.' " (*Ibid.*)

"Consensual encounters do not trigger Fourth Amendment scrutiny. [Citation.] Unlike detentions, they require no articulable suspicion that the person has committed or is about to commit a crime." (*In re Manuel G.* (1997) 16 Cal.4th 805, 821.) "[A] detention does not occur when a police officer merely approaches an individual on the street and asks a few questions. [Citation.] As long as a reasonable person would feel free to disregard the police and go about his or her business, the encounter is consensual and no reasonable suspicion is required on the part of the officer. Only when the officer, by means of physical force or show of authority, in some manner restrains the individual's liberty, does a [detention] occur." (*Id.* at p. 821.)

To determine whether an encounter is a detention, courts consider " 'all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter.' [Citation.] This test assesses the coercive effect of police conduct as a whole, rather than emphasizing particular details of that conduct in isolation. [Citation.] Circumstances establishing a seizure might include any of the following: the presence of several officers, an officer's display of a weapon, some physical touching of the person, or the use of language or of a tone of voice indicating that compliance with the officer's request might be compelled. [Citations.] The . . . individual citizen's subjective belief [is] irrelevant in assessing whether a seizure triggering Fourth Amendment scrutiny has occurred." (*In re Manuel G., supra,* 16 Cal.4th at p. 821.)

We agree with the magistrate that the encounter in the park was consensual. The officers approached Gaines on foot. Only one officer was in uniform. McMillan showed Gaines his badge, but the officers did not display weapons or use a commanding or forceful tone of voice indicating Gaines was not free to leave. There were no demands or threats—to the contrary, the tone and pace of the conversation were informal, and included small talk. (See *People v. Hughes* (2002) 27 Cal.4th 287, 328 [no detention in

part because conversation was "nonaccusatory" and "routine"].) The encounter was not transformed into a detention merely because the officers asked Gaines for preliminary information such as his name, address, and date of birth, and for his identification. (*People v. Leath* (2013) 217 Cal.App.4th 344, 353.) Officers "may generally ask questions of [an] individual" or "ask to examine the individual's identification" without rendering a consensual encounter a seizure. (*Florida v. Bostick* (1991) 501 U.S. 429, 434–435.) The only possible physical contact the officers had with Gaines occurred when McMillan may have briefly touched Gaines's hand, as a signal for Gaines to turn his hands over. While the encounter was not brief, it was not accusatory in nature. Considering all the circumstances, we conclude the encounter in the park was consensual.

Even if we assume for the sake of argument the encounter constituted a detention, the officers had reasonable suspicion to detain Gaines. "A detention is reasonable under the Fourth Amendment when the detaining officer can point to specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity." (*People v. Souza* (1994) 9 Cal.4th 224, 231.) Here, any assumed detention was supported by reasonable suspicion. The park was located about a block from the robbery, which occurred the previous evening. Before seeing Gaines in the park, McBride had reviewed the crime bulletin, which depicted a man wearing blue and black track pants, a matching shirt, and a fedora. McBride noticed Gaines because his jacket was similar to the one worn by the man in the crime bulletin. Gaines also was wearing a "Fedora-type hat" consistent with the suspect in the crime bulletin photograph, and his build and race matched the description of the suspect. The officers did not, as Gaines argues, detain him on a "hunch." They detained Gaines because they believed he matched the description of the suspect depicted in the crime bulletin. (See *People v. Stanley* (2017) 18 Cal.App.5th 398, 404.)

C. Gaines Was Not Under Arrest at the Cold Show Identification; His Detention was Supported by Reasonable Suspicion

Next, Gaines claims he was arrested without probable cause during the cold show identification because he was handcuffed for 20 minutes with two officers by his side. "The scope of the intrusion permitted when a person is detained 'will vary to some extent with the particular facts and circumstances of each case. This much however, is clear: an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time.' [Citation.] The United States Supreme Court has refused to adopt 'any outside time limitation' on a lawful detention." (*People v. Bowen* (1987) 195 Cal.App.3d 269, 273.)

" 'In assessing whether a detention is too long in duration to be justified as an investigative stop, we consider it appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant. [Citations.] A court making this assessment should take care to consider whether the police are acting in a swiftly developing situation, and in such cases the court should not indulge in unrealistic second guessing. [Citation.] A creative judge engaged in post hoc evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished. But "[t]he fact that the protection of the public might, in the abstract, have been accomplished by 'less intrusive' means does not, by itself, render the search unreasonable." [Citations.] The question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it.' " (*People v. Bowen, supra,* 195 Cal.App.3d at p. 273.)

Here, Gaines was detained while officers transported Y.Y. to the cold show location. Neither the length of the detention nor the fact that Gaines was handcuffed render the detention a de facto arrest. "[H]andcuffing does not render every seizure an arrest." (*People v. Gentry* (1992) 7 Cal.App.4th 1255, 1267.) The officers " 'diligently

pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain' " Gaines. As a result, the 20-minute detention was not an impermissible de facto arrest. (*People v. Bowen, supra,* 195 Cal.App.3d at p. 274 [defendant, who was handcuffed for 25 minutes while victim was brought to the scene for a cold show identification, was not arrested]; *In re Carlos M.* (1990) 220 Cal.App.3d 372, 384–385 [no arrest where defendants were patted down, handcuffed, and transported in a patrol car to the hospital for identification]; *People v. Soun* (1995) 34 Cal.App.4th 1499, 1516–1520 [30-minute encounter wherein defendants were patsearched, handcuffed, transported in patrol cars to police station parking lot, was not an arrest].)

Gaines's contention that the detention was not supported by reasonable suspicion fails for the reasons discussed above. Y.Y.'s failure to identify Gaines in a photo lineup did not negate reasonable suspicion.

II.

The Magistrate Properly Denied the Motion to Traverse

Gaines argues the magistrate erred by denying his motion to traverse the search warrant. According to Gaines, the supporting affidavit omitted material information, and the court applied the wrong legal standard when evaluating the motion.

A. Search Warrant Affidavit and Motion to Traverse the Warrant

On April 10, 2017, Thorp applied for a warrant to search Gaines's residence. In his affidavit, Thorp described the robbery. When describing the police investigation, Thorp averred: "Immediately following the incident, Off. Peterson . . . viewed video from the Victim's apartment building . . . and obtained a photo of the suspect from the video. The photo was the back side of the suspect and clearly showed the suspect's clothing and showed the suspect carrying a large knife. I issued a Crime Bulletin via department email. On 4-09-17, Off. McBride . . . and Off. McMillian . . . viewed the Crime Bulletin and later located a subject, Gaines, wearing a similar fedora hat and sweatshirt in the Fillmore Mini Park at 1100 Fillmore Street. Off. McBride obtained video of Gaines and his clothing on his department issued body worn camera. Off.

McBride and Off. McMillian did not arrest Gaines at this time. [¶] After reviewing the video that was later obtained from the . . . lobby and comparing it to the body worn camera footage, we determined that Gaines was most likely the suspect who committed the robbery and attack on the Victim.

"On 4-10-17 . . . Off. McBride and numerous other officers . . . set up surveillance on Gaines' residence . . . . They waited for Gaines to exit his apartment and when he exited through the back door of his residence, Off. McBride detained him for a cold show identification. [¶] Sgt. Hunt . . . and I responded to the Victim's residence and drove her to where Gaines was being detained. Sgt. Hunt read the Victim the cold show admonishment on the way to and prior to viewing Gaines. The Victim positively identified Gaines as the suspect that robbed and attacked her. [¶] Gaines was immediately taken into custody and transported to Northern Police Station. [¶] . . . [¶] Based on the above information, I believe that Gaines robbed . . . the Victim in the lobby of her apartment building. I believe Gaines is in violation of . . . 211 PC (Robbery) and evidence in the form of stolen property from the Victim and clothing from Gaines will be located at Gaines' home. The seizure of these items will aid in the prosecution of this case."

Gaines moved to traverse the warrant, claiming Thorp "failed to disclose or misrepresented" six categories of "crucial information" in the search warrant affidavit. As relevant here, the magistrate who signed the search warrant limited the evidentiary hearing to one omission: facts relating to the photo lineup.[3] At the hearing, Thorp testified that he reviewed the surveillance video and the photographs taken from the surveillance video. The photographs showed a person wearing blue and black pants, and a matching sweatshirt, with a black jacket over it. The pants had the number "23" on the side. Thorp also watched footage from the body camera. That footage showed a "black

[3] At the evidentiary hearing, the court admitted the search warrant affidavit, surveillance video from the lobby of Y.Y.'s building, and the body camera video. The court also admitted photographs taken from the surveillance video and the body camera video.

male . . . person of interest with a hat similar to that being worn by the suspect from the night before, a sweatshirt, a Nike blue and black with some white on the sweatshirt similar to that . . . worn by the suspect the night before." Photographs taken from the body camera footage showed a man in a blue, black, and grey sweatshirt with the number 23 on the sleeve.

Thorp concluded the person in body camera video was the same person depicted in the surveillance video: "The hat was very similar, but what really caught our attention was the sweatshirt. It had a lot of the same distinct characteristics, such as it had a little black on the bottom of it, a little black strip, it has a white line and it also had some blue." Thorp also noted the park was "one pretty long block" from where the robbery occurred, and that the robbery had occurred only 16 hours before McBride's initial interaction with Gaines. Thorp believed Gaines was a similar height and weight to the suspect. Thorp acknowledged Gaines was wearing jeans in the park, not the pants with the number "23" worn by the suspect in the surveillance video.

Thorp testified about the photo lineup. He used the most recent photograph of Gaines he could find: a 10-year old mugshot. At the photo lineup, Y.Y. did not identify a suspect. Y.Y. said one person's photograph looked like the assailant, and that another person's photograph " 'could be' " the assailant. When shown Gaines's picture, Y.Y. said " 'No.' " Y.Y. explained to the officers that she could not clearly remember the assailant's face, but said that if she saw the assailant " 'in person, [she] probably' " could. At the cold show identification, however, Y.Y. "100 percent positively picked [Gaines] out."

Thorp applied for the search warrant for Gaines's residence. In his supporting affidavit, Thorp omitted the fact that Y.Y. did not identify Gaines at the photo lineup. Thorp did not include the information because Y.Y. "didn't pick anybody out. She wasn't sure. She stated the people in the lineup that had dark skin, she . . . said it . . . looks like them, but I'm not sure. She wasn't able to pick anyone out, and she

had said that if she saw the person live she'd be able to pick them out." Thorp acknowledged Y.Y.'s failure to identify a suspect was exculpatory, but claimed he was not trying to deceive the magistrate by omitting the information.

Defense counsel argued Thorp intentionally omitted exculpatory information from the affidavit and, as a result, the affidavit was "very misleading." The prosecution countered that Thorp did not intend to mislead the magistrate and that even when the photo lineup information was added, the affidavit established probable cause to search Gaines's residence.

The court denied the motion to traverse the warrant. It stated, "the latter part of the *Franks* [*v. Delaware* (1978) 438 U.S. 154] analysis is that 'when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required.' So I think the flip side of that in an omissions case is knowing what I know now, would I still have authorized a search?" The court continued: "So I do have more information available to me now, including information such as assessing the credibility of the officer and seeing Mr. Gaines here in court and being able to compare that to, for example, the photographic evidence that was presented both to the officers and to the victim. [¶] So the standard here is whether there was probable cause to justify a search, and based on all of the information that I now have available to me I still would have authorized the search, and I find that there was probable cause to justify a search of Mr. Gaines' residence . . . and as a result the motion is denied."

B. The Omitted Facts Did Not Make the Affidavit Substantially Misleading and Would Not Have Altered the Probable Cause Determination

A defendant may move to traverse a search warrant "by showing that the affiant deliberately or recklessly omitted material facts that negate probable cause when added to the affidavit." (*People v. Eubanks* (2011) 53 Cal.4th 110, 136.) " 'A defendant who challenges a search warrant based upon an affidavit containing omissions bears the burden of showing that the omissions were material to the determination of probable cause.' " (*Id.* at p. 136.) " 'Facts are "material" and hence must be disclosed if their

omission would make the affidavit *substantially misleading*. . . . [Or] if, because of their inherent probative force, there is a substantial possibility they would have altered a reasonable magistrate's probable cause determination.' " (*People v. Sandoval* (2015) 62 Cal.4th 394, 409–410.) "Whether an affidavit provided the magistrate ' "substantial basis" ' for concluding there was probable cause is an issue of law 'subject to our independent review.' [Citation.] But, because '[r]easonable minds frequently may differ on the question whether a particular affidavit establishes probable cause,' we accord deference to the magistrate's determination and ' "doubtful or marginal" ' cases are to be resolved with a preference for upholding a search under a warrant." (*People v. French* (2011) 201 Cal.App.4th 1307, 1315.)

Gaines argues the search warrant affidavit omitted the following material information: (1) Y.Y. failed to identify Gaines in the photo lineup and suggested another person in the lineup looked like the assailant; (2) Y.Y. described the assailant as 5 feet 11 inches to 6 feet, while Gaines was 5 feet 6 inches; and (3) during the robbery, Y.Y. had her head down, was scared, and acknowledged she probably could not remember the assailant's face. According to Gaines, these facts "could have affected" the magistrate's probable cause determination. But "could have affected" is not the standard. To prevail on a motion to traverse the warrant based on material omissions, Gaines must demonstrate a " 'substantial possibility [the omitted information] would have altered a reasonable magistrate's probable cause determination,' " or that the omissions made the affidavit " '*substantially misleading*.' " (*People v. Eubanks, supra*, 53 Cal.4th at p. 136.)

Gaines has not satisfied this standard. In the search warrant affidavit, Thorp averred he reviewed a photograph taken from the surveillance video, which "clearly showed the suspect's clothing," and that the next day, McBride and McMillan saw Gaines wearing a "similar fedora hat and sweatshirt." Thorp reviewed the body camera footage, compared it with the lobby surveillance video, and determined Gaines was "most likely" the robbery suspect. The affidavit also included information about the cold show identification. Even with the omitted information, the affidavit established a fair probability evidence of a crime would be found in Gaines's residence. Our conclusion is

bolstered by the fact that the picture used in the lineup was 10 years old, and that Y.Y. told the officers she would be able to identify the perpetrator if she saw him in person.[4]

We conclude the omitted facts were "not material because there is no 'substantial possibility they would have altered a reasonable magistrate's probable cause determination,' and their omission did not 'make the affidavit[s] *substantially misleading*.' " (*People v. Eubanks, supra,* 53 Cal.4th at p. 136.) Even if the affidavit was "tested by adding the omitted information, the magistrate still would have issued [the] warrant[]." (*Ibid.*; see also *People v. Panah* (2005) 35 Cal.4th 395, 473 [omissions in search warrant affidavit "were immaterial to probable cause"]; *People v. Bradford* (1997) 15 Cal.4th 1229, 1299 [no error "in finding that, considered as amended to include the above described information, the affidavit[s] established probable cause"].) The magistrate properly denied the motion to traverse the search warrant.

DISPOSITION

The judgment is affirmed.

[4] We are not persuaded by Gaines's claim that the court "based its denial of [his] motion on an erroneous legal standard." Some of the court's observations were irrelevant, but when considered as a whole, the court's comments suggest it considered whether the omitted information, if added to the affidavit, would have affected the probable cause determination. (See *People v. Gibson* (2001) 90 Cal.App.4th 371, 382 [where information is intentionally omitted, the remedy is to restore the information and reevaluate the affidavit for probable cause]; *People v. Zapien* (1993) 4 Cal.4th 929, 976 [correct decision " ' "will not be disturbed on appeal merely because given for a wrong reason" ' "].)

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Jones, P.J.

WE CONCUR:

_____
Simons, J.

_____
Burns, J.

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